No. 03-865

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NANCY BURTON,

Petitioner,

v.

CONNECTICUT YANKEE ATOMIC POWER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a contemnor who repeatedly violates an injunction permitted to challenge the injunction on appeal from a contempt finding?

2. Does a federal injunction that limits collateral challenges to an existing federal judgment violate First Amendment rights?

3. Does imposition of a compensatory civil contempt sanction deny due process rights where the District Court affords the contemnor an opportunity to file opposition briefs, a show-cause hearing, and a hearing on sanctions (which the contemnor fails to attend)?

CORPORATE DISCLOSURE STATEMENT

Connecticut Yankee has no parent. The Connecticut Light and Power Company ("CL&P"), a wholly-owned subsidiary of Northeast Utilities, holds more than 10% of Connecticut Yankee's stock. CL&P has issued debt securities to the public. Western Massachusetts Electric Company ("WMEC") and Public Service Company of New Hampshire ("PSNH"), each of which is a wholly-owned subsidiary of Northeast Utilities, collectively hold more than 10% of Connecticut Yankee's stock. WMEC and PSNH have issued debt securities to the public. Northeast Utilities is a publicly held company. New England Power Company ("NEP") holds more than 10% of Connecticut Yankee's stock, including the prior interest of Montaup Electric Company. NEP is a wholly-owned subsidiary of National Grid USA. National Grid USA is a subsidiary of National Grid plc, which is a publicly held company. Boston Edison Company and Cambridge Electric Light Company, each of which is a wholly-owned subsidiary of NSTAR, collectively hold more than 10% of Connecticut Yankee's stock. Boston Edison Company has publicly held debt and preferred stock. NSTAR is a publicly held company.

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Respondent, Connecticut Yankee Atomic Power Company ("Connecticut Yankee"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That unreported opinion is included in the appendix to the petition.

COUNTER-STATEMENT OF CASE

Petitioner Nancy Burton, an attorney whose five-year disbarment from practice in Connecticut was recently affirmed by the Connecticut Supreme Court[1], asks this Court to consider whether she may evade responsibility for deliberate and repeated violations of a federal injunction. Specifically, Petitioner seeks review of the Second Circuit's order affirming a judgment of the District Court, which found Petitioner in contempt for violating its Order of Permanent Injunction dated March 15, 2002, and awarded compensatory fees and expenses to Connecticut Yankee.[2]

On January 29, 2002 the District Court entered an Order on Consent of Parties (the "Order") which fully and finally adjudicated an action brought by Connecticut Yankee on November 21, 2001, entitled *Connecticut Yankee Atomic Power Co. v. Town of Haddam*, D. Conn. No. 3:01 CV2178 (AHN) (the "Related Action"), against the Town of Haddam, the Town of Haddam Board of Selectmen, Cynthia Williams, in her capacity as the Town of Haddam Zoning Enforcement Officer, and Alan Paskewich, in his capacity as the Town

1. *Burton v. Mottolese*, 267 Conn. 1, 835 A.2d 998 (2003).

2. The Second Circuit's decision, which appears at 1a of Petitioner's appendix, affirmed several judgments in related cases that were consolidated for purposes of appeal. The Petition seeks review only of the judgment affirming the contempt order against Attorney Burton.

of Haddam Building Official (collectively, the "Town").[3] The Order compromised the Related Action and ordered, *inter alia*, that Connecticut Yankee be allowed to proceed with its construction and use of an independent spent fuel storage installation ("ISFSI") on its federally licensed property.

On or about February 27, 2002, Petitioner commenced this action on behalf of her clients in Connecticut state court against Connecticut Yankee as a collateral challenge to the Order. The prayer for relief in this action seeks to have the trial court declare the settlement agreement embodied in the Order "null and void" and vacate a building permit issued pursuant to the Order. On March 5, 2002, Connecticut Yankee removed this action to federal court, where it was docketed as *Egri v. Connecticut Yankee Atomic Power Co.*, D. Conn. No. 3:01CV400 (AHN).[4]

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3. Petitioner makes several demonstrably false representations to this Court about the conduct of the Related Action. Among other things, Petitioner suggests that the District Court conducted an *ex parte* status conference with Connecticut Yankee. In fact, both the Town and the District Court confirmed that the Town was represented at the status conference. Also, prior to settling the case, the Town held two informational meetings to explain the substance of the settlement agreement, which the District Court ultimately ordered as the Order. The Town was under no obligation to do so. The Petition also fails to inform the Court that the District Court had had the benefit of extensive briefing and oral argument on Connecticut Yankee's claim in a previous related proceeding and had expressed the view that Connecticut Yankee would prevail on the merits. Both the Town's willingness to settle and the District Court's approval of the settlement were informed by that evaluation.

4. Petitioner misrepresents to this Court that the *Egri* plaintiffs own property abutting Connecticut Yankee's property. (Pet. at 5.) In fact, the *Egri* plaintiffs testified to the contrary, and accordingly, the District Court ultimately entered summary judgment for Connecticut Yankee based, *inter alia*, on lack of standing. (*See* App. to Pet. at 14a.) The Second Circuit affirmed that ruling, and the *Egri* plaintiffs did not seek review by this Court.

Because *Egri* constituted an impermissible collateral attack on an existing federal court judgment, Connecticut Yankee moved the District Court for temporary and permanent injunctive relief.

After hearing a day of extensive testimony and argument on March 15, 2002, the District Court granted Connecticut Yankee's Application for Temporary and Permanent Injunction pursuant to 28 U.S.C. § 1651, the All Writs Act. In its Order Granting Permanent Injunction under the All Writs Act (the "Permanent Injunction"), the District Court concluded that a "Permanent Injunction was necessary and appropriate in aid of this Court's jurisdiction in [the Related Action]" and found, *inter alia*, that:

> D. Connecticut Yankee would suffer irreparable harm if the requested permanent injunction did not issue because it would suffer further delays in its ongoing decommissioning process;
>
> E. Other actions challenging the validity of the Order (or any actions taken in accordance with the Order) in any other judicial or administrative forum would violate the Order, frustrate its implementation, or undermine this Court's jurisdiction in the Related Action;
>
> F. Plaintiffs claims regarding the Order lack merit;
>
> * * *
>
> H. A permanent injunction is necessary to ensure the integrity and finality of the Order, and to prevent frustration of its implementation. . . .

(App. to Pet. at 27a-28a.) The Permanent Injunction prohibited any new lawsuits or administrative challenges filed by Petitioner:

> Plaintiffs, their successors, assigns, agents and attorneys, and all persons with notice of the permanent injunction, are hereby permanently enjoined from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the Order, including the Building Permit issued thereunder, other than by a direct appeal of this Court's Order or other filings in this action or in the Related Action.

(*Id.* at 28a.)

Petitioner did not appeal from the Permanent Injunction or seek any other relief for more than three months, until July 2002. Instead, despite the clear and unambiguous language of the then-unchallenged Permanent Injunction, Petitioner initiated collateral challenges to the Order in Connecticut state court and before the Town of Haddam Inland Wetlands Commission—actions expressly forbidden by the Permanent Injunction. Specifically, Petitioner filed *Warmsley v. Connecticut Yankee Atomic Power Co.* in Connecticut state court on April 17, 2002, seeking a "temporary and permanent injunction to enjoin construction activities associated with the ISFSI pending completion of a satisfactory archaeological survey of the property or until further notice of this Court."[5] In May of 2002, Petitioner

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5. *Warmsley* asserted a claim under Conn. Gen. Stat. § 22a-19a, which protects properties listed or under consideration for listing on the National Register for Historic Places. The suit was based on pure speculation that Venture Smith, an historic figure, might have (Cont'd)

wrote to the Town Inland Wetlands Commission demanding, among other things, the revocation of Connecticut Yankee's permit and Letter to Proceed. (*See* App. to Pet. at 39a-50a.) Petitioner also appeared at an Inland Wetlands Commission meeting on June 10, 2002, and challenged the construction of the ISFSI. At the same meeting, she presented the Commission with an unsigned complaint, which she threatened to file. Then, on June 13, 2002, Petitioner initiated that threatened action in Connecticut Superior Court by a complaint against Connecticut Yankee and the Town Inland Wetlands Commission entitled *Neighbors Opposed to Residential Atomic Dumps v. Inland Wetlands Commission*, ("*NORAD*"). *NORAD* seeks, among other things, injunctive relief requiring Connecticut Yankee to cease construction of the ISFSI and to "restore the site to the conditions existing status quo ante."[6]

(Cont'd)
owned the ISFSI site and that the site might contain artifacts of archaeological significance to Venture Smith. Comprehensive investigations by archaeologists retained by Connecticut Yankee and by the State of Connecticut have refuted this speculation and eliminated the putative statutory basis for the suit. Despite the State of Connecticut's unequivocal statements that the ISFSI site is not and was not under consideration for listing on the National Register of Historic Places, Petitioner continues to make that false representation to this Court. (Pet. at 8.)

6. Connecticut Yankee removed both *Warmsley* and *NORAD* to federal court pursuant to the All Writs Act, consistent with then-existing law in the Second Circuit. Following this Court's decision in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), Connecticut Yankee agreed that those cases should be remanded. Notwithstanding the fact that the Permanent Injunction remains in effect, following the remand, Petitioner continued to violate the Permanent Injunction by noticing depositions and issuing subpoenas in *Warmsley*. The state court refused to allow Petitioner to proceed because of the federal injunction as well as the state court's concerns as to the plaintiffs' standing.

Faced with repeated and brazen violations of the Permanent Injunction, on June 14, 2002, Connecticut Yankee filed a Motion for Contempt and a proposed Order to Show Cause with the District Court. Before signing the show cause order, the District Court held a status conference on June 20, 2002, although not required to do so. After offering Petitioner the opportunity to resolve the matter without a contempt hearing, the District Court ordered a show cause hearing for July 1, 2002.

Prior to commencing the hearing on July 1, 2002, the District Court again gave Petitioner ample opportunity to avoid a judgment of contempt. The District Court offered to forego any contempt proceedings if Petitioner agreed to withdraw without prejudice the actions she had filed, and to obey the Permanent Injunction pending a ruling by the Second Circuit on her clients' challenge to the Permanent Injunction. When Petitioner declined to accept the District Court's offer, the District Court suggested that the cases could be stayed rather than withdrawn, pending the Second Circuit's decision. Petitioner declined these offers, however, and the District Court held a contempt hearing. At the conclusion of the proceeding, the District Court found that Petitioner had violated the Permanent Injunction by filing and prosecuting *Warmsley* and *NORAD*, both of which expressly sought relief plainly prohibited by the Permanent Injunction, and by "participat[ing] in proceedings before the Inland Wetlands Commission. . . . and [writing] various letters to the Commission and to specific individuals associated with the Commission seeking to impede construction of the ISFSI." (App. to Pet. at 20a.)

On July 22, 2002, the District Court conducted a hearing on the record to address the appropriate amount of compensatory fees and costs to award Connecticut Yankee as result of Petitioner's contempt (the "July 22 Hearing").

The District Court noticed the July 22 Hearing by two separate written communications. First, the Clerk of the United States District Court sent to all counsel of record, including Petitioner, a copy of the Court's Order of Contempt dated July 8, 2002, which states: "The Court will conduct a hearing at 2:00 p.m. on July 22, 2002 in which Connecticut Yankee may offer evidence supporting its claim for fees and expenses and Attorney Burton will have an opportunity to object to the claimed fees and expenses." The July 9, 2002 docket entry for the Order of Contempt also bears the notation "hearing scheduled for 7/22/02 @ 2:00 P.M." Second, the Clerk sent to all counsel of record by separate mailing a calendar notice stating that the District Court would hold a hearing on July 22, 2002, at 2:00 p.m. However, Petitioner did not attend the hearing.[7]

When Petitioner did not appear, the District Court attempted to contact her by telephone twice and delayed commencement of the hearing. At the hearing, Connecticut Yankee presented testimony and documentary evidence regarding the costs and expenses caused by Petitioner's contumacious behavior. Specifically, Connecticut Yankee's counsel testified, among other things, as to his educational background and experience, his firm's billing arrangements with Connecticut Yankee, how his firm's rates compare with the market, and the methodology by which Connecticut Yankee calculated the fees and expenses for which it sought reimbursement. Connecticut Yankee offered as full exhibits to the District Court: (a) a redacted summary of work performed by Connecticut Yankee's attorneys that was a direct result of Plaintiffs' contumacious behavior, which includes descriptions of the work, time spent and cost; and (b) a similar summary of work performed by Connecticut

7. Petitioner now concedes that the July 22 hearing was properly noticed but claims that she failed to read such notice "by inadvertence." (Pet. at 10.)

Yankee's attorneys that is attributable to the contempt motion and proceedings. Connecticut Yankee also provided to the Court, under seal, copies of unredacted billing information. At the conclusion of Connecticut Yankee's evidence, the District Court recessed in order to call Petitioner again. At the conclusion of the hearing, the District Court found

> after review of the exhibits offered, and Mr. [Allan B.] Taylor's [attorney for Connecticut Yankee] testimony, that reasonable fees and expenses incurred by Connecticut Yankee related to [Petitioner] Ms. Burton's actions in violation of the Permanent Injunction amount to $171,546.80, and she is ordered to reimburse Connecticut Yankee in that amount.

Petitioner appealed from the contempt judgment to the Second Circuit, where the appeal was consolidated with several related appeals by Petitioner's clients from orders entered in this case and from orders entered in the Related Action.[8] On July 1, 2003, the Second Circuit (Winter, McLaughlin, Cabranes, Js.) affirmed each of the orders from which an appeal was taken by summary order.[9] With respect

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8. While her contempt appeal was pending before the Second Circuit, Petitioner continued to violate the Permanent Injunction. On July 1, 2003, the District Court again found Petitioner in contempt for violating the Permanent Injunction by nearly identical conduct. Petitioner appealed from the second contempt order to the Second Circuit. On December 23, 2003, the Second Circuit (Walker, C.J., Kearse, Cabranes, Js.) summarily affirmed the second contempt order, finding the appeal to be "frivolous". *Egri v. Connecticut Yankee Atomic Power Co.*, 2d Cir. No. 03-78437, Order Granting Motion for Summary Affirmance (2d Cir. Dec. 23, 2003). Petitioner has moved for reconsideration en banc of that order.

9. The Second Circuit rejected challenges to the Order in the Related Action as well as to the Permanent Injunction and the (Cont'd)

to the District Court's contempt order, the Second Circuit concluded that: (a) Petitioner could not challenge the underlying Permanent Injunction in the contempt proceeding because she had chosen to violate the injunction rather than to take an appeal or seek other relief; (b) the District Court did not abuse its discretion in finding Petitioner in contempt because the evidence showed that Petitioner violated a clear and unambiguous order without making any effort to comply; and (c) Petitioner's failure to object to the District Court's method of calculating fees precluded a subsequent challenge, which in any case is "without merit." (App. to Pet. at 15a-18a.) On September 11, 2003, the Second Circuit denied Petitioner's requests for panel rehearing and for rehearing en banc.

REASONS FOR DENYING THE PETITION

The Second Circuit properly disposed of Petitioner's meritless contempt appeal. The Court of Appeals correctly rejected Petitioner's attempt to defend her contumacious conduct with a collateral attack on an injunction that she unilaterally disregarded without even attempting to obtain relief from its clear prohibitions. The Second Circuit's order does not conflict with Sixth Circuit authority.

(Cont'd)
Summary Judgment Ruling in this case. (*See* App. to Pet. at 1a-18a.) No one has petitioned this Court for review of those parts of the Second Circuit's decision.

A. Sixth Circuit Authority Does Not Conflict With The Second Circuit's Conclusion That The All Writs Act, 28 U.S.C. § 1651, Permits Federal Courts To Enjoin Non-Parties From Collaterally Attacking A Federal Court Judgment.

This Court should deny the Petition because the Second Circuit's decision rests on well-established law and does not conflict with the Sixth Circuit authority presented by Petitioner. Petitioner's challenge is, as the Second Circuit observed, "plainly without merit." (App. to Pet. at 17a.) Certainly, Petitioner presents no issues warranting further review by this Court. Petitioner's argument is essentially that, as a non-party, she cannot be enjoined from asserting collateral challenges to a federal judgment in state court and municipal administrative proceedings. That argument is simply untenable.

It is well-established that, pursuant to the All Writs Act, a court may enjoin a person from collaterally challenging a federal order in state court. *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328 (2d Cir. 1985). Moreover, the court is not limited to enjoining persons who are parties to the litigation before the court. *See United States v. Int'l Bhd. of Teamsters*, 266 F.3d 45, 50 (2d Cir. 2001). Although an All Writs injunction cannot generally bind a non-party to the *terms* of a consent judgment, the All Writs Act authorizes federal courts to enjoin non-parties from frustrating the *implementation* of such a judgment. *Id.*

Notwithstanding Petitioner's efforts to manufacture a conflict with Sixth Circuit authority, the Sixth Circuit cases cited by Petitioner are entirely consistent with Second Circuit teaching. The primary case relied on by Petitioner, *United States v. City of Detroit*, 329 F.3d 515 (6th Cir. 2003),

involved an All Writs injunction requiring the Army Corps of Engineers, a non-party, to comply with the terms of a consent judgment by accepting material for disposal. The Sixth Circuit affirmed the District Court's injunction order, concluding that the court could bind the Army Corps of Engineers to the consent order because the obligations under the consent order were based on legal authority, not on the private contract of the parties to the consent order. *City of Detroit* is in accord with the Second Circuit's decision in *Association for Retarded Citizens of Connecticut, Inc. v. Thorne*, 30 F.3d 367 (2d Cir. 1994), where the court held that the All Writs Act did not permit the enforcement of a privately negotiated consent decree against a third party.[10]

The crucial distinction between *City of Detroit* and *Retarded Citizens*, on the one hand, and this case, on the other, is that *City of Detroit* and *Retarded Citizens* imposed affirmative obligations under a consent judgment on a non-party whereas the District Court in this case merely prohibited Petitioner from collaterally challenging the Order.[11] As the Second Circuit explained the distinction in *Teamsters*, "the district court has sought not to bind appellants to the consent decree, but to enjoin them from acts that would frustrate the consent decree's operation on parties that are bound to the decree." *United States v. Int'l Bhd. of Teamsters*, 266 F.3d at 50 (distinguishing *Ass'n for Retarded Citizens of Conn., Inc. v. Thorne*, 30 F.3d 367 (2d Cir. 1994)).

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10. The same reasoning is applied by the Sixth Circuit in *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Michigan Department of National Resources*, 141 F.3d 635 (6th Cir. 1998). In *Grand Traverse Band*, the Sixth Circuit concluded that a federal court could bind two non-party municipalities to a consent judgment that enforced Native American fishing rights pursuant to a federal treaty.

11. The fact that the Sixth Circuit affirmed the injunction order and that the language quoted by Petitioner is merely dicta further discredits Petitioner's attempt to create a circuit conflict.

The cases relied on by Petitioner (besides not being in conflict with the Second Circuit) are distinguishable for the same reason: all involved injunctions requiring a non-party to abide by the terms of a consent order. By sharp contrast, this case does not involve the enforcement of the Order against Petitioner or the imposition of any obligations on Petitioner; rather the Permanent Injunction prohibits Petitioner from frustrating or undermining the Order through resort to litigation in other fora. The Permanent Injunction merely limits the fora in which Petitioner may challenge the Order.

B. The Second Circuit Properly Concluded That Petitioner May Not Use Contempt Proceedings To Challenge An Underlying Order From Which She Did Not Appeal Or Seek Other Relief.

This Court should deny the Petition because the propriety of the Permanent Injunction cannot be raised by Petitioner in this contempt proceeding. The Second Circuit properly concluded that Petitioner cannot challenge the Permanent Injunction because she did not challenge or appeal from the Permanent Injunction prior to violating it.[12] (App. to Pet. at 17a.)

A civil contempt proceeding is not the appropriate avenue to attack an underlying order that was not challenged through proper procedures. *United States v. Rylander*, 460 U.S. 752, 756-57 (1983); *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995) ("[A] party may not challenge a district court's order by violating it."). Indeed,

> '[i]t would be a disservice to the law if we were to depart from the long-standing rule that a

12. As noted, the Second Circuit rejected the challenges to the Permanent Injunction in the consolidated appeal below, and no one has petitioned this Court for review of that part of the Second Circuit's decision. *See supra* note 9.

> contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.'

United States v. Rylander, 460 U.S. at 756-57 (quoting *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948)). Moreover, the general rule applies even to "transparently invalid" injunctions unless the contemnor "made a good faith effort to seek emergency relief from the appellate court." *United States v. Scott*, 187 F.3d 282, 286 n.4 (2d Cir. 1999) (citations and internal quotations marks omitted). *See also United States v. Cutler*, 58 F.3d at 833 (court need not address prior restraint and other arguments concerning alleged transparent invalidity of order because contemnor "made no good faith effort to seek emergency relief from the appellate court" prior to violating the order and "can point to no compelling circumstances justifying his decision to ignore orders") (citations and internal quotation marks omitted).

In this case, the Permanent Injunction had been in effect for more than three months before the contempt proceeding, and Petitioner "made no effort to seek relief from the injunction from [the Court of Appeals] until over three months after its issuance, nor has she alleged any compelling circumstances which would excuse her delay in seeking appellate review of that order." (App. to Pet. at 16a.) She decided instead to disregard the clear order of the District Court and act as if it did not exist. As the court explained in *Lavine v. Comcoa Ltd.*, 70 F.3d 1191, 1193-94 (11th Cir. 1995), that decision was improper:

> We believe the instances when lawyers can be told by the district court in no uncertain terms not to

> do 'X' and, yet, the lawyer can go on to do 'X' with impunity are (and ought to be) few and far between, especially where the appellate courts – as in this case – are open to the lawyer to settle the matter in an orderly way, but the lawyer pursues no appeal. In these circumstances, for [the lawyer] just to disregard the district court's clear order, based on his personal belief that it was invalid, was not merely bold; it was bad.

Because she chose to disobey and disregard the District Court's clear order rather than to challenge it through appropriate legal channels, Petitioner may not now defend against her blatant violations of the District Court's Permanent Injunction by collaterally attacking that injunction.

C. Even If Challengeable Here, The Permanent Injunction Does Not Offend The First Amendment.

Petitioner asserts that the District Court improperly found her in contempt because her contumacious behavior is protected by the First Amendment and because the Permanent Injunction creates a prior restraint in violation of the First Amendment. In effect, she raises a First Amendment challenge to the Permanent Injunction. For the reasons stated in Section B. above, Petitioner cannot challenge the Permanent Injunction in this Court.

Even if Petitioner could challenge the Permanent Injunction, nothing in the language or effect of the Permanent Injunction violates her First Amendment rights. Petitioner attempts to mislead this Court by portraying the Permanent Injunction as a boundless proscription against her appearing at public meetings or in judicial fora. The Permanent Injunction does not prevent Petitioner from appearing or

speaking at public meetings or hearings of municipal bodies or litigating matters in other courts unless the purpose and/or effect of such activity is to impede or frustrate the Order. For that reason, the District Court found Petitioner in contempt not for appearing before the Inland Wetlands Commission or litigating matters generally but specifically for her past activities "seeking to impede construction of the ISFSI." (App. to Pet. at 20a.) Petitioner's suggestion to the contrary notwithstanding, the Permanent Injunction is clear and enjoins only such conduct as is necessary and appropriate to aid the District Court's jurisdiction and prevent the frustration of the Order; it explicitly permits persons to challenge the Order in this case and in the Related Action. Further, under the All Writs Act, a federal court may, where necessary and appropriate in aid of its jurisdiction, prevent non-parties from litigating in other fora matters that would impede or frustrate an order of the court. *See In re Baldwin-United Corp.* , 770 F.2d 328 (2d Cir. 1985). Indeed, in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 34 n.* (2002), this Court noted that a federal court may properly order the dismissal of a rival action pending in state court.

In short, Petitioner can only create a First Amendment issue by mischaracterizing the Permanent Injunction. Even if her challenge were permissible, it lacks merit. Accordingly, this Court should deny her petition for writ of certiorari.

D. The District Court's Imposition Of Compensatory Civil Contempt Sanctions Did Not Violate Petitioner's Due Process Rights.

There can be no question in this case that the compensatory contempt sanctions imposed on Petitioner are civil in character.[13] The District Court's contempt order clearly was compensatory, directing "Attorney Burton to pay Connecticut Yankee reasonable fees and expenses in the amount of $171,546.80." (App. to Pet. at 23a.) The District Court afforded Petitioner three hearings on the record at which she could have avoided a contempt sanction.[14]

The traditional distinction between civil and criminal contempt sanctions is that criminal contempt is intended to be punitive whereas civil contempt is intended to be either coercive or compensatory. Because coercive civil contempt sanctions may sometimes resemble criminal contempt sanctions, stricter procedural requirements may be warranted; by contrast, compensatory civil contempt sanctions are not so problematic. *See Int'l Union, United Mine Workers v.*

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13. Petitioner never raised this issue before the District Court or the Second Circuit. Moreover, as Petitioner concedes (Pet. at 26), she never asked the District Court to apply criminal contempt standards to what was plainly a civil contempt proceeding. Her present attempt is merely an effort to concoct an issue for review by this Court.

14. Petitioner seeks to bolster her due process claim by asserting that the District Court did not permit her to present evidence. The testimony proferred by Petitioner was the opinion of a non-attorney member of the community that the District Court lacked jurisdiction and that Petitioner's acts do not violate the Permanent Injunction. The District Court correctly concluded that the witness's opinion was irrelevant to the proceeding and that the only relevant facts were not in dispute. The District Court's discretionary decision not to admit irrelevant evidence does not present a due process issue worthy of this Court's review.

Bagwell, 512 U.S. 821, 829 (1994). "In the civil contempt context the district court's discretion in imposing non-coercive sanctions is particularly broad and only limited by the requirement that they be compensatory." *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1521 (11th Cir. 1990).

Petitioner either fails to appreciate or ignores the fact that this is a compensatory award. It is undisputed that Connecticut Yankee presented evidence only of its fees and costs resulting from Petitioner's contumacious behavior. The District Court expressly stated that the contempt sanctions were for Connecticut Yankee's "reasonable fees and expenses." (App. to Pet. at 23a.)

Petitioner's disingenuous reliance on *Bagwell* is based on her mischaracterization of the civil contempt sanction as coercive. *Bagwell*, which considered whether a contemnor should have been afforded a jury trial prior to the imposition of $52 million in coercive civil contempt sanctions, has no application here. Similarly, Petitioners' reliance on *State Farm Mutual Auto Insurance . Co. v. Campbell*, __ U.S. __, 123 S. Ct. 1513 (2003), is misplaced. *State Farm*'s discussion of the due process limitations on the amount of punitive damage awards is irrelevant to the award of *compensatory* fees and costs in this case. In this case, the District Court did not seek to punish or coerce Petitioner. The District Court only awarded those "reasonable fees and expenses" that Connecticut Yankee proved it suffered as a result of Petitioner's contumacious behavior. Compensatory contempt sanctions do not entitle Petitioner to criminal due process protections.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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